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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 204

DANIEL F. BOONE, *Petitioner*,

v.

MARTHA LIGHTNER BOONE, as Trustee for Martha Penelope Boone, a Minor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
PETITION FOR WRIT OF CERTIORARI	1
Opinions Below	1
Statement of Matter Involved	2
Jurisdictional Statement	6
Questions Presented	7
Reasons for Allowance of Writ	7
BRIEF IN SUPPORT OF PETITION	9
Jurisdiction	9
Specifications of Error to be Urged	10
Summary of Argument	11
Argument	12
1. The judgment was not entitled to full faith and credit and not *res judicata* of the issues involved	12
2. Soldiers' and Sailors' Civil Relief Act	15
3. Allegation of Fraud in procurement of judgment	16
4. Equitable defenses of fraud and bad faith	16
5. Issues of fact raised in answer should have been tried	17
Conclusion	17

AUTHORITIES CITED.

31 Am. Jur. Sec. 653, p. 228	16
31 Am. Jur. Sec. 660, pp. 234-235	17
Freeman on Judgments, 5th Ed., Vol. 3, Sec. 1234	17
United States Constitution	
Fifth Amendment	10
Article 4, Sec. 1	10

STATUTES.

Page

Judicial Code, Sec. 237(b) 6, 9
Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1181 ..... 3, 5, 6, 11, 13, 15
Supreme Court Rules, Rule 38, par. 5(c) 6

CASES CITED.

Boone v. Lightner, et al., 319 U. S. 561, 87 L. Ed. 1587 .. 6, 15
Griffin v. Griffin, 327 U. S. 220, 90 L. Ed. 635 ..... 14, 15
Horton v. Stegmyer, et al., 175 Fed. 756 17
Keller v. Association, 71 Mo. App. 465 15
Lewin v. Gladstein, 142 N. C. 482 16
Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870 16
Reid v. Gregory, 78 Miss. 247, 28 So. 385 15
Reynolds v. Stockton, 140 U. S. 254, 35 L. Ed. 464 .... 14, 15
Simon v. Southern Ry. Co., 236 U. S. 115, 59 L. Ed. 492 16
Throckmorton v. U. S., 98 U. S. 61, 25 L. Ed. 93 16
Wyman v. Newhouse, 93 Fed. (2d) 313 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

DANIEL F. BOONE, *Petitioner,*

v.

MARTHA LIGHTNER BOONE, as Trustee for Martha Penelope Boone, a Minor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Daniel F. Boone, by his attorney, prays that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia to review a final judgment of that Court entered in the above-entitled cause on February 17, 1947, affirming a final judgment of the District Court of the United States for the District of Columbia, entered on December 18, 1945 (R. 39).

Opinions Below.

(1) Informal memorandum of F. Dickinson Letts, filed December 17, 1945 (R. 32).

(2) The opinion of the United States Court of Appeals for the District of Columbia (R. 37), 81 App. D. C. ——; 160 Fed. (2d) 13 (Adv. Sheets).

(3) Order of the United States Court of Appeals for the District of Columbia denying petition for a rehearing (R. 40).

Statement of Matter Involved.

The action in the District Court was a suit on a foreign judgment which had theretofore been entered against the petitioner in this cause, in the Superior Court of Henderson County, North Carolina. In the North Carolina cause, the defendant was sued only in the representative capacity as trustee for Martha Penelope Boone, a minor, who was his daughter. The plaintiffs in that proceeding were Clarence M. Lightner, Theodore A. Lightner, Alice Lightner Hopf, Martha Lightner Boone and Martha Penelope Boone, a minor, the latter being represented by her next friend, all suing in their individual capacities (R. 6). In the suit on this judgment in the District Court of the United States for the District of Columbia, in which the judgment herein sought to be reviewed was entered, plaintiff Martha Lightner Boone, who had sued in her individual capacity in the original proceeding in North Carolina, sued in the capacity of trustee for the said Martha Penelope Boone, a minor; and, the petitioner, Daniel F. Boone, was sued in the District Court in his individual capacity, whereas, in the original proceeding in the North Carolina court, he had only been made defendant in the capacity of trustee as aforesaid (R. 4 and 6).

The defendant moved to dismiss the action in the District Court of the United States for the District of Columbia on the ground that the same did not state a claim upon which relief could be granted, but the motion was denied (R. 17). The defendant then answered the complaint alleging a number of separate defenses (R. 19-30). The various defenses contained in defendant's answer may be summarized thus:

a. That the parties to the action in the District Court of the United States for the District of Columbia were not identical with the parties to the action in which the judgment sued on was entered, in that the defendant was not sued in his individual capacity in the North Carolina court but merely as trustee; and, that the plaintiff in the District Court sued in a representative capacity as trustee whereas in the North Carolina court, she appeared only as a plaintiff in her own right (R. 22).

b. That the complaint to which the defendant, in his representative capacity as trustee, responded in the North Carolina proceeding did not raise an issue on which the personal money judgment which was entered against the defendant should have been awarded. That there was no amendment of the complaint and the judgment was found and rendered in defendant's absence from the jurisdiction after he had vainly sought to have the proceedings stayed pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (R. 20-22).

c. That under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, the defendant still had the right to petition the North Carolina court in which the judgment had been entered to vacate the judgment; and, that upon such petition the North Carolina proceeding might be reopened, so that the judgment entered in that cause was not a final judgment for purposes of the action in the District of Columbia (R. 19 and 20).

d. That the judgment of the North Carolina court was not entitled to full faith and credit in the District Court of the United States for the District of Columbia and was not *res judicata* of the issues raised therein, because of its impeachibility for fraud in the procurement thereof and because of the bad faith on the plaintiff's part

in prosecuting the proceeding in the North Carolina court (R. 22-28).

e. A lack of jurisdiction in the North Carolina court to enter the judgment was likewise pleaded, based on the allegation that at the time when the action was instituted, the securities and funds, claimed in that proceeding to have been trust property, were in the District of Columbia; and, that the infant beneficiary and the defendant who was sued as trustee, were both domiciled in the District of Columbia when the judgment was entered (R. 29-30).

f. The defendant denied any and every allegation of malfeasance, misfeasance or wrongdoing in the performance of his duties as trustee (R. 29).

Following the filing of defendant's answer in the District Court, the plaintiff moved for a judgment on the pleadings (R. 31-32), which motion was granted (R. 32-33), and judgment so entered. This is the judgment which was subsequently affirmed by the United States Court of Appeals for the District of Columbia, and is now sought to be reviewed in this Court.

This petitioner respectfully suggests to the court that it was error for the District Court of the United States for the District of Columbia to give full faith and credit to the judgment of the North Carolina court:

1. Because the judgment entered in the North Carolina Court was beyond the scope of the relief sought in the complaint upon which it was based. In the North Carolina proceeding, as appears from the record, the plaintiffs alleged, in substance, that plaintiff Martha Lightner Boone had turned over to the defendant the proceeds of two insurance policies on the life of her deceased father, which funds were to constitute a trust for the principal benefit of the infant plaintiff Martha Penelope Boone, subject to certain provisions as to its management and terms; that the defendant

(your petitioner) as trustee had not rendered an account and that the plaintiffs were apprehensive that said fund was being mismanaged and dissipated (R. 6-7). The plaintiffs prayed for the following relief, in substance (R. 21-22):

(a) For a declaration that the defendant was trustee and a statement of the terms of such trust.

(b) That the defendant be required to disclose the nature and character of the securities in which the trust fund was invested, the income therefrom and the disposition of the same.

(c) That the defendant be required to show that the fund had been kept intact and was safely invested in income producing securities and he be required to report to the court at regular intervals concerning said trusts.

(d) That in the event of the defendant's failure fully to account or to show that the funds were properly invested, that he be removed as trustee and some other trustee appointed in his stead.

(e) For costs and general relief (R. 21-22).

Your petitioner, as the defendant in the North Carolina proceeding, so sued in his representative capacity as trustee, answered the complaint and procured a continuance of the cause until a subsequent term of court; then when the case was called, he sought a further continuance on the ground that he was actively engaged in military service and that under provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, was entitled to have the case continued, which motion was denied and the case tried in his absence (R. 7-8 and 19-20). As a result of this hearing, in defendant's absence under the circumstances aforesaid, he was removed as trustee, plaintiff Martha Lightner Boone was substsituted as trustee, and a personal judgment was entered against the defendant in favor of the substituted

trustee for $11,490.56 (R. 13). This was done without any amendment of the complaint as a basis for this personal judgment and without any prayer in the original complaint for the award of such relief.

2. In addition, your petitioner says that the answer of the defendant in the action in the District Court of the United States for the District of Columbia raised clear issues of fact relating to the impeachability of the judgment of the North Carolina Court, for alleged extrinsic fraud and bad faith in the procurement of such judgment, which issues should have been tried by a jury and not disposed of as a matter of law without an opportunity for proof, on a motion for judgment on the pleadings (R. 22-28).

It is proper for your petitioner to refer to the case of *Boone* v. *Lightner, et al.*, 319 U. S. 561, 87 L. Ed. 1587, wherein, on certiorari to the Supreme Court of the State of North Carolina this court reviewed the aforementioned judgment of the North Carolina court on the single question of whether your petitioner had been deprived of his rights under the Soldiers' and Sailors' Civil Relief Act of 1940, and sustained the judgment as to that issue.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule 38, par. 5(c) which latter provides for the granting of certiorari where the United States Court of Appeals for the District of Columbia,

> "has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute, of the United States, which has not been, but should be, settled by this court; or where that court has not given proper effect to an applicable decision of this court."

The matter of whether the District Court of the United States for the District of Columbia should have given full

faith and credit to the judgment of the Superior Court of Henderson County, North Carolina, and held that all issues which might have been decided in that cause were *res judicata* was a constitutional question. The question of whether the summary entry of a judgment upon the pleadings in the District Court, without affording to your petitioner the right to offer proof of facts pleaded to impeach the judgment sued on, was a denial to your petitioner of due process of law, and likewise a constitutional question. It is a question of substance, whether the District Court gave proper effect to applicable decisions of this court, in cases where final judgments of State Courts have been held to be impeachable for extrinsic fraud in the procurement of them, or where the right to enforce the same in other jurisdictions has been denied because of bad faith on the plaintiff's part.

Questions Presented.

(1) Did not the District Court of the United States for the District of Columbia commit error in entering the judgment sought herein to be reviewed, summarily upon the pleadings, in the light of the record, itself, and of the facts pleaded in your petitioner's answer to the complaint attacking the validity of the said judgment and its enforceability in the District of Columbia?

(2) Did not the United States Court of Appeals for the District of Columbia commit error in affirming the judgment of the District Court of the United States for the District of Columbia?

Reasons Relied on for Allowance of Writ.

It is respectfully urged by the petitioner that the judgment entered in the District Court was erroneous and should not have been entered for these reasons.

(1) It was apparent from the record that the personal money judgment of the North Carolina court

which was entered against your petitioner in his individual capacity was beyond the scope of the issues in that proceeding and, therefore, a nullity. That the defendant in his individual capacity was not a party to that proceeding.

(2) That your petitioner's answer as defendant in the District Court raised issues of fact which, if proved, tended to impeach the validity of the judgment sued on, so that the judgment was not entitled to receive full faith and credit in the District of Columbia as *res judicata* of the issues which were before the North Carolina court.

(3) That your petitioner was denied due process of law in the entry of this judgment upon the pleadings.

(4) That the United States Court of Appeals for the District of Columbia committed error in affirming the judgment of the District Court and in denying your petitioner's request for a re-hearing.

Wherefore, your petitioner prays that this court may issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, directing it to certify and send to this court a full and complete transcript of the record therein, to the end that the cause may be reviewed and determined by this court as provided by law; that the judgment may be reversed with costs; and for such other and further relief as may be appropriate.

THOMAS H. PATTERSON,
Attorney for Petitioner,
Woodward Building,
Washington, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

DANIEL F. BOONE, *Petitioner*,

v.

MARTHA LIGHTNER BOONE, as Trustee for Martha Penelope Boone, a Minor.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the United States Court of Appeals for the District of Columbia in the above-entitled cause will appear in 81 U. S. App. D. C. ....; 160 Fed. (2d) 13 (Adv. Sheets) (R. 37-38).

Jurisdiction.

The petitioner claims that he is entitled to have the opinion of the United States Court of Appeals for the District of Columbia reviewed by virtue of Section 237 (b) of the Judicial Code, as amended, by the Act of February 13, 1925, for the following reasons:

1. That the said court in its opinion complained of in the accompanying petition for a Writ of Certiorari, decided a

question of substance relating to the application of the Constitution of the United States, and thereby denied to your petitioner due process of law as guaranteed to him under the Fifth Amendment to the Constitution.

2. The said court did not give proper effect to applicable decisions of this court construing Article 4, Section 1 of the Constitution and laws based thereon, relative to the giving of full faith and credit by the courts of one state, or the District of Columbia, to the judicial proceedings of another state.

Specifications of Error to be Urged.

That the District Court of the United States for the District of Columbia erred in entering the judgment which was thereafter affirmed by the United States Court of Appeals for the District of Columbia, and that the said appellate court erred in sustaining the judgment of the District Court for the following reasons:

1. The action in the District Court was a suit upon a foreign judgment entered in the Superior Court of Henderson County, North Carolina. A copy of the judgment sued on was exhibited to the complaint filed in the District Court. It appeared from this record that the defendant had been sued only in his representative capacity as trustee, yet a personal judgment for the recovery of money from him as an individual was entered, without any amendment of the complaint for the purpose of claiming such relief, or by making the defendant a party in his individual capacity. It likewise appeared from the record that while the defendant had answered the original complaint filed in the North Carolina proceeding in his representative capacity, which complaint did not ask the recovery of a money judgment against him, the defendant was absent when the case was tried in the North Carolina Court and when the said judgment was entered, being actively on duty in the Army of the United States, having sought, without avail, to have the case postponed because of such military service.

2. The answer of the defendant in the District Court of the United States for the District of Columbia raised issues of fact properly pleaded which, if true, tended to impeach the judgment which was sued on because of alleged extrinsic fraud in its procurement and likewise raised the issue of bad faith on the part of the plaintiff suing in the District Court in her effort to enforce the said judgment. It is, therefore, urged that it was error on the part of the District Court to deny to the defendant therein the opportunity to prove the facts set forth in his answer, in his attack upon the validity and enforceability of the North Carolina Court, through summarily entering a judgment upon the pleadings, without proof of any kind.

SUMMARY OF ARGUMENT.

1. The judgment sued on in the District Court was not entitled to full faith and credit in the District of Columbia and was not *res judicata* of the issues involved.

2. The parties to the action in the District Court were not identical with those in the North Carolina court in which the judgment sued on was entered, in that the defendant was sued only in his representative capacity, as trustee, in the North Carolina court, while he was sued only in his individual capacity in the District Court.

3. The complaint to which the defendant responded in the North Carolina proceeding in his representative capacity as trustee did not raise an issue on which the personal money judgment against the defendant should properly have been awarded. There was no prayer in that complaint for such personal judgment. No amendment of the complaint was made, no additional process served or notice given the defendant, and the judgment was found and entered in defendant's absence, after he had vainly sought to have the trial stayed, pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, because of his active service in the Army of the United States.

4. Defendant's answer in the District Court alleged that the judgment of the North Carolina Court was impeachable for fraud which it was claimed had been perpetrated by the plaintiff, and specific acts charged as extrinsic fraud in the procurement of the judgment were pleaded; also, the answer alleged bad faith on the plaintiff's part in the prosecution of the North Carolina proceeding, which acts of bad faith, if true, would have constituted an equitable defense to the action upon the judgment in the District Court. The issues of fact raised by defendant's answer attacking the validity of the judgment and the right of the plaintiff to sue upon the same in the District Court should have been tried; therefore, it was error for the court to dispose of the same in a summary way by entering judgment upon the pleadings, without giving the defendant an opportunity to prove the facts so pleaded.

5. The judgment of the District Court, entered in the manner aforementioned, in the light of the record and of the facts pleaded in defendant's answer, further violated defendant's constitutional rights by depriving him of property without due process of law.

ARGUMENT.

1.

The Judgment Sued on Was Not Entitled to Full Faith and Credit, and Was Not Res Judicata of the Issues on Which it Was Based.

The suit in the North Carolina Court on which the judgment sued on in the District Court was entered did not seek any money judgment or other relief against the defendant in his individual capacity. The defendant was merely sued as trustee for his minor daughter, and the relief so sought was in substance the following:

1) a judgment declaring the defendant to be a trustee and construing the terms of such trust;

2) a disclosure by the defendant as trustee of the nature and character of the trust property, the amount of income therefrom and the disposition being made of such income;

3) that the defendant be required to show to the Court that such trust property had been kept intact and properly invested and that he be required to report to the Court at regular intervals;

4) that in the event that the defendant failed to account, etc., that he be removed as trustee, and another appointed in his stead;

5) a judgment for costs and for further relief (R. 21-22).

The defendant, as trustee, filed an answer in the North Carloina court, to the complaint as filed, and procured a continuance of the cause from the January-February, 1942, term of the court until the first day of the May-June, 1942, term. Then when the defendant through an attorney, sought by a motion properly made, to procure a further continuance of the cause, because the defendant was then on active military duty in the Army of the United States, and that he would not be present at a trial at that term (R. 7-8), this motion was denied, notwithstanding the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, and the case was proceeded with in the defendant's absence (R. 7-8, 19-20). Without any amendment of the pleadings and without further notice to the defendant, the personal judgment sued on below was entered (R. 13).

In order for a judgment to be relied on as *res judicata* of the matter to which it relates, when the same matter is drawn into issue in a subsequent proceeding, it must appear that the judgment in the former case was entered in a court of competent jurisdiction, upon the same subject matter, and between the same parties, suing and appearing in the same capacity or character as litigants. When a

complaint tenders one cause of action, and in that suit service on or appearance is made, a subsequent judgment therein, entered in the absence of defendant upon another or different cause of action from that stated in the complaint, is without binding force in the courts of the state where it is entered; and, of course, has no better standing in the courts of another state, notwithstanding the full faith and credit clause of the Constitution. *Griffin* v. *Griffin,* 327 U. S. 220, 90 L. Ed. 635; *Reynolds* v. *Stockton,* 140 U. S. 254, 35 L. Ed. 464.

> ". . . the rule is universal that where he (defendant) appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one Court of a state as to all subsequent inquiries in the Courts of the same state, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one state to judgments rendered in the Court of another state."
>
> *Reynolds* v. *Stockton,* 140 U. S. 254, 35 L. Ed. 464.

It is no answer to the defendant's contention that the personal money judgment which was entered against him was without notice, for the plaintiff to say that the defendant was before the court when such judgment was entered, by virtue of his having been served with original process when the suit was brought and his having answered the complaint as filed. The complaint on which the process was issued and to which the defendant responded by his answer did not seek a money judgment against the defendant, nor did it name the defendant a party to the cause, in his individual capacity. Such being the case, the only valid way in which the judgment now sued on could have been entered would have been through an amendment of the complaint so as to lay the basis for such relief and the giving of proper notice thereof to the defendant through additional

process, or otherwise, which latter practice was not followed. *Griffin* v. *Griffin*, 327 U. S. 220, 90 L. Ed. 635; *Reynolds* v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464.

The fact that the complaint in the North Carolina proceeding contained a prayer for general relief did not afford a basis for the personal money judgment against the defendant, since such judgment was not contemplated in the complaint. *Reynolds* v. *Stockton*, 140 U. S. 254, 35 L. Ed. 464; *Reid* v. *Gregory*, 78 Miss. 247, 28 So. 385; *Keller* v. *Association*, 71 Mo. App. 465.

2.

Soldiers' and Sailors' Civil Relief Act.

While this court held in the case of *Boone* v. *Lightner, et al.*, 319 U. S. 561, 87 L. Ed. 1587, in effect, that it was not error in the North Carolina Court to proceed with the trial of this case, under its particular circumstances, notwithstanding the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1181, that decision did not deal with the question of whether the judgment so entered by the North Carolina court was such a final judgment that it should be given full faith and credit in other jurisdictions, pending the expiration of the time within which the defendant might move to have the judgment vacated and the case reopened in the North Carolina court. It is shown by the record in this case that the point was raised in the District Court and in the United States Court of Appeals for the District of Columbia. Since the period of time within which the defendant had the statutory right to move to vacate the said judgment had not elapsed when the action on the judgment was instituted in the District Court of the United States for the District of Columbia, the point is still made that the institution of the action in the District Court was premature.

3.

Fraud in Procurement of Judgment.

The answer specifically alleged in the fifth and sixth defenses pleaded, that the judgment of the North Carolina Court was impeachable for fraud and bad faith (R. 22-28). Various specific acts were pleaded as having been performed by the plaintiff and as constituting extrinsic fraud in the procurement of this judgment (R. 22-26). Assuming the truth of these allegations, the Court below should not have awarded judgment on the pleadings; and, of course, the motion for judgment on the pleadings admitted the truth of these allegations, for the purposes of the said motion.

The defense of extrinsic fraud may be made in a suit upon a judgment tainted by the same, in the Courts of a state other than the state in which such judgment is entered, and in a collateral proceeding. *Throckmorton* v. *U. S.*, 98 U. S. 61, 25 L. Ed. 93; *Marshall* v. *Holmes*, 141 U. S. 589, 35 L. Ed. 870; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 59 L. Ed. 492; *Wyman* v. *Newhouse*, 93 Fed. (2d) 313; *Lewin* v. *Gladstein*, 142 N. C. 482.

4.

Equitable Defenses of Fraud and Bad Faith.

The sixth defense pleaded in defendant's answer in the District Court denied the plaintiff's right to recover on equitable grounds, asserting therefor, that the plaintiff did not act in good faith in the prosecution of the North Carolina proceeding (R. 27-28). The grounds for this charge of bad faith are specifically alleged in the answer (R. 27-28). Extrinsic fraud constitutes one of the chief grounds for the interference by a Court of Equity with a judgment at law; 31 Am. Jur., Sec. 653, p. 228.

> "A Federal Court sitting in equity has jurisdiction to disregard or to enjoin the enforcement of an uncon-

scionable judgment of a state or of a national Court for new causes, such as fraud, accident or mistake, which deceive the Court into a wrong decree or which prevent the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the Court which rendered the judgment."

Horton v. *Stegmyer, et al.*, 175 Fed. 756.

Particular acts constituting fraud sufficient to secure equitable relief from a judgment may consist of any description of *mala fides* practiced in obtaining the judgment . . .

31 Am. Jur. pp. 234-235, Sec. 660.

"The fraudulent concealment of facts which if known at the time would have prevented recovery is always good ground for coming into equity to obtain relief from a judgment at law."

Freeman on Judgments (5th Ed.) Vol. 3, Sec. 1234.

5.

Issues of Fact Raised in Answer Should Have Been Tried.

The Court's refusal to receive proof of these facts was a denial to the defendant of due process of law.

CONCLUSION.

In conclusion, it is respectfully submitted that this court should grant a Writ of Certiorari, to the end that the aforementioned judgment entered in this cause against your petitioner in the United States Court of Appeals for the District of Columbia may be reviewed and reversed by this Court.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 304.

DANIEL P. BOONE, *Petitioner*,

v.

MARTHA LOUISE BOONE, as Trustee for Martha Penelope Boone, a Minor,

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	Page
Statement of the Case	1
Point I—North Carolina Judgment Entitled to Full Faith and Credit	2
Point II—Soldiers and Sailors Civil Relief Act	3
Point III—Alleged Fraud in Procurement of Judgment	4
Conclusion	6

CASES CITED.

Boone v. Lightner, 319 U.S. 561, 87 L. ed. 1587	1, 4
Crim v. Handley, 94 U.S. 652, 24 L. ed. 216	5
Ferguson v. Bateman, 1 App. D.C. 279	2
Fidelity Storage Co. v. Urice, 56 App. D.C. 202	5
Hammett v. Minar, 60 App. D.C. 286	3
Hendrickson v. Hinckley, 17 How. 443, 15 L. ed. 123	5
Indemnity Ins. Co. v. Smoot, 80 U.S. App. D.C. 287, 152 F. (2) 667	3, 5
In re Cool's Estate 19 N.J. Misc. 236, 18 A. (2) 714	3
Jones v. Van Doren, 130 U.S. 684, 32 L. ed. 1077	3
Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683, 39 L. ed. 859	5
Lightner v. Boone, 222 N.C. 205, 22 S.E. (2) 426	1
McManus v. Sawyer, 231 Fed. 231	2
Marine Ins. Co. v. Hodgson, 7 Cranch 332, 3 L. ed. 362	4
Merillat v. Hensey, 34 App. D.C. 398	3
Miller Rubber Co. v. Massey, 36 F. (2) 464	5
Reynolds v. Reynolds, 21 Cal. (2) 580, 134 P. (2) 251	3
Talbott v. Pickford, 36 App. D.C. 289	5
Tayloe v. Merchants Fire Ins. Co., 9 How. 390; 13 L. ed. 187	3
United States v. Throckmorton, 98 U.S. 61, 25 L. ed. 93	5
Walden v. Bodley, 14 Pet. 156, 10 L. ed. 398	3
Whittemore v. Patten, 84 Fed. 51	2

TEXTS.

1 Bogert on Trusts and Trustees, Sec. 862	3
2 Scott on Trusts, Sec. 199.1	3

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No. 204.

DANIEL F. BOONE, *Petitioner*,

v.

MARTHA LIGHTNER BOONE, as Trustee for Martha Penelope Boone, a Minor.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Respondent brought this action in the United States District Court for the District of Columbia upon a money judgment obtained against petitioner in North Carolina (R. 4, 6-17), which judgment had been affirmed by the Supreme Court of that State (*Lightner* v. *Boone*, 222 N. C. 205, 22 S. E. (2) 426), and affirmed on certiorari by this Court *Boone* v. *Lightner*, 319 U. S. 561, 87 L. ed. 1587). In his answer, petitioner undertook to attack the judgment in the North Carolina suit on the grounds, among others, that (1) petitioner was in the Army at the time of that suit and was,

therefore, protected by the Soldiers and Sailors Civil Relief Act of 1940; (2) that the complaint in the suit named him only as Trustee; (3) that the judgment in North Carolina was obtained by fraud and was, therefore, not entitled to full faith and credit (R. 19-30). Pursuant to Rule 12 (c) of the Federal Rules of Civil Procedure, respondent moved for judgment on the pleadings (R. 31). This motion was granted, the trial court finding that ability of the defendant to conduct his defense was not materially affected by his military service (R. 32). Judgment in favor of the respondent was accordingly entered (R. 32, 33). This judgment was affirmed by the United States Court of Appeals for the District of Columbia (R. 37).

ARGUMENT.

I.

North Carolina Judgment Entitled to Full Faith and Credit.

Under Point 1 of his brief, petitioner contends that in the North Carolina complaint there was no prayer for judgment against him in his individual capacity. Hence, he asserts personal judgment, even though for the amount of his default, was void. This argument is not sustained by the authorities.

It is well settled that a suit in equity for an accounting brings the entire administration of the trustee under review, and contemplates that a judgment or decree for the balance found, whichever way, will be entered.

> *Ferguson* v. *Bateman*, 1 App. D. C. 279, 287
> *McManus* v. *Sawyer*, 231 Fed. 231, 238
> *Whittemore* v. *Patten, et al*, 84 Fed. 51

Equally well settled is the proposition that in equity, under the prayer for general relief, the court will adapt and shape its decree in accordance with the true equity of the cause. On the evidence before it, the North Carolina Court found that Boone was accountable for $19,677.99 (R. 10);

that he had turned over to the Court's Clerk securities valued at $8,187.43 (R. 11). For the difference, namely, $11,490.56, the Court concluded Boone was still accountable, and accordingly awarded judgment against him individually (R. 13). This was plainly contemplated by the complaint, and in strict conformity to the established practice in equity.

Walden v. *Bodley*, 14 Pet. 156, 10 L. ed. 398, 402
Tayloe v. *Merchants Fire Ins. Co.*, 9 How. 390; 13 L. ed. 187, 193
Jones v. *Van Doren*, 130 U. S. 684, 32 L. ed. 1077
Merillat v. *Hensey*, 34 App. D. C. 398, 407
Hammett v. *Minar*, 60 App. D. C. 286, 53 F. (2) 144
1 Bogert on Trusts and Trustees, Sec. 862
2 Scott on Trusts, Sec. 199.1

II.

Soldiers and Sailors Civil Relief Act.

Petitioner contends that the judgment of the District Court was premature because entered prior to the expiration of ninety days after the termination of his military service. Respondent insists that irrespective of whether petitioner has a right to petition the North Carolina Court to vacate its decree, that decree can not be collaterally assailed. Indeed, even the pendency of such a petition would not constitute a valid defense to this action.

Indemnity Insurance Co. of North America v. *Smoot*, 80 U. S. App. D. C. 287, 152 F. (2) 667

Moreover, we deny that any right to file such a petition is available. The Soldiers and Sailors Civil Relief Act of 1940 (50 U. S. C. A. Sec. 520) applies only to proceedings in which "there shall be a default of any appearance by the defendant".

In re Cool's Estate, 19 N. J. Misc. 236, 18 A. (2) 714.
Reynolds v. *Reynolds*, 21 Cal (2) 580, 134 P. (2) 251

Petitioner was personally served with process (R. 6), filed an answer (R. 7), had his day in court and was not prejudiced in the conduct of his defense by his military service connection. This Court has already determined that "the absence of himself and of all his numerous and not uncompensated counsel on the day of judgment was dictated wholly by litigious strategy". (*Boone* v. *Lightner,* 319 U. S. 561, 87 L. ed. 1587, 1596.)

II.

Alleged Fraud in Procurement of Judgment.

Petitioner claims, under Points 3 and 4, that the fifth and sixth defenses in his answer (R. 22-48) alleged extrinsic fraud which renders the North Carolina judgment subject to collateral attack. Assuming, for the purpose of argument, that fraud is alleged, the actions complained of did not result in injury to the petitioner.

In substance, the fraud alleged consists in the assertion that "in the North Carolina proceeding, a witness testified that in her opinion the settlor of the trust did not have sufficient mental capacity to know the contents of a certain paper writing signed by him and witnessed by one W. D. Parris; that said Parris was present when the paper was signed and that the existence and availability of said Parris as a witness was withheld from the court." The paper writing pertains solely to the terms of the trust. It did not relate to the handling and mismanagement of the trust funds for which an accounting was sought. Petitioner did not allege any fraud whatsoever as regards the evidence upon which the Court's findings of dereliction, malfeasance and losses were based (R. 12).

In no aspect were the facts alleged sufficient as a basis for collateral attack upon the North Carolina judgment, or an injunction to restrain its enforcement.

Marine Ins. Co. v. *Hodgson,* 7 Cranch, 332-336, 3 L. ed. 362, 363

Hendrickson v. *Hinckley*, 17 How. 443, 445, 15 L. ed. 123, 124
Crim v. *Handley*, 94 U. S. 652, 659 24 L. ed. 216, 219
United States v. *Throckmorton*, 98 U. S. 61, 65, 25 L. ed. 93, 95
Talbott v. *Pickford*, 36 App. D. C. 289, 297
Fidelity Storage Co. v. *Urice*, 56 App. D. C. 202, 203

In other words, the answer plainly showed no real defense. On the contrary, it demonstrated that the only obstacle to the full presentation of his case was peitioner's own "litigious strategy". (*Boone* v. *Lightner, supra*)

The fact that petitioner remained away from North Carolina, after having answered and taken depositions, relying upon delaying tactics, does not affect the finality of the North Carolina judgment.

Last Chance Mining Co. v. *Tyler Mining Co.*, 157 U. S. 683, 39 L. ed. 859, 863
Miller Rubber Co. of N. Y. v. *Massey*, 36 F. (2) 466, 467

It is also perfectly clear that the evidence to which petitioner referred in his answer was available in 1942, at the time of the trial in North Carolina and might have been offered therein. The tender of such evidence more than three years after entry of the North Carolina judgment came too late. (*Indemnity Ins. Co. of N. A.* v. *Smoot, supra.*)

In the North Carolina proceeding, the Court said:

> "The record shows that the defendant (*petitioner herein*) deposited said trust funds in the Wachovia Bank & Trust Company, and subsequently withdrew practically the entire amount and used the same in marginal stock speculation on the New York Stock Exchange. In dealing in this manner, he received many checks from the stock brokers handling his accounts, redepositing some of them in the bank and then making withdrawals or using the checks for his personal purposes. Such speculation on the part of the trustee is wrong. Under the laws of North Carolina, the trustee

> could not purchase said stocks with his trust funds. The bulk of the loss, however, is due to his wrongful withdrawal of the funds for his personal purposes. When called to book by the institution of this action, the trustee attempted technical and evasive tactics. In his answer, which was duly sworn to, he stated that he had not withdrawn any of the trust funds. The evidence proves the falsity of this." (R. 12. Italics supplied)

In the very lengthy answer interposed by petitioner in the pending action, he does not deny either marginal speculation or use of the trust funds for his personal purposes. His answer tendered no issue upon which he was entitled to a trial. Accordingly, respondent was entitled to judgment on the pleadings.

CONCLUSION.

A careful examination of the answer filed by the petitioner in the trial court shows that it is an ingenious and ingenuous attempt to retry issues already determined adversely to him. This was the view of the trial court. It was the conclusion of the Court of Appeals. The judgment of affirmance was clearly right and certiorari should be denied.

Respectfully submitted,

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